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Supreme Court, U.S.
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No. 88-1595

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR (Executrix of the Will of GEORGE M. KERR, JR.), and BARBARA K. CLISBY,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In this private antitrust case, which was commenced in 1974, respondents ultimately secured a treble-damage judgment of $9,567,939 after several retrials and intervening appellate proceedings. After payment of the judgment, respondents claimed interest on the judgment under 28 U.S.C. § 1961, as amended in 1982. The 1982 amendment substituted for the various state court interest rates a uniform federal rate of interest on judgments keyed to United States Treasury bill auction prices. This case presents the following questions involving the application of this provision and broader issues of retroactive application of federal statutes:

1. Whether the Court below erred when it applied the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date where the legislative history and statutory language of the amended statute show that Congress intended that it only apply prospectively and where manifest injustice to Kaiser results from retroactive application?

2. Whether the Court below erred in using the presumption derived from *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), in favor of retroactively applying current law to a pending case, notwithstanding controlling authorities of this Court, recently reaffirmed in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988), holding that an unqualified presumption exists that, in the absence of clear and unequivocal statutory language or legislative history to the contrary, legislation does *not* apply retroactively?

3. Whether 28 U.S.C. § 1961, which specifically provides that interest shall be calculated from the "date of entry of the *judgment*", may be construed to require the calculation of interest from the date of *verdict*?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly-owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. As of August 3, 1989, Kaiser Aluminum & Chemical Corporation had the following parent companies:

Kaiser Aluminum & Chemical Corporation
Owned by: KaiserTech Limited
[44,898,914 shares]
Brown Brothers Harriman, Inc.
[406 shares]

KaiserTech Limited
Owned by KLU Holdings, Inc.

KLU Holdings, Inc.
Owned by MPI Investments, Inc.

MPI Investments, Inc.
Owned by MAXXAM Properties Inc.

MAXXAM Properties Inc.
Owned by MAXXAM Group Inc.

MAXXAM Group Inc.
Owned by MAXXAM Inc.

As of August 3, 1989, Kaiser Aluminum & Chemical Corporation had the following subsidiaries (excluding wholly-owned subsidiaries):

DOMESTIC
Alpart Farms (Jamaica) Ltd.
Alumina Partners of Jamaica
Delta America Insurance Co.
Delta Holdings, Inc.
Filtrol Corporation
Kaiser Center Properties
Kaiser Center Properties, Inc.

Kaiser Delaware, Inc.
Oakland City Center Hotel Company, Inc.
Queensland Alumina Security Corporation
Second Queensland Alumina Security Corporation

FOREIGN
Aluminium Products Company Limited
Anglesey Aluminium Limited
Anglesey Aluminum Construction Limited
Anglesey Aluminum Metal Limited
Boyne Smelters Limited
Hopewell International Insurance Ltd.
Kaiser Jamaica Bauxite Company
Queensland Alumina Finance N.V.
Queensland Alumina Holdings N.V.
Queensland Alumina Limited
Societe D'Etudes des Bauxites du Cameroun
Thai Metal Works Company, Ltd.
Tortuga Casualty Company
United Insurance Company
Volta Aluminium Company Limited

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OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to the Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit, (the "Petition") No. 88-1595, at P.A.1.* The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out at P.A.3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out at P.A.29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out at P.A.31.

JURISDICTION

The judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989. (P.A.1). Kaiser's timely petition for rehearing and suggestion of rehearing *in banc* was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* (P.A.29-30). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition was timely filed under 28 U.S.C. 2101(c) and Rules 20.2 and 20.4 of this Court. This Court, by Order dated June 19, 1989, granted the Petition and the Conditional Cross-Petition of Respondents, No. 88-1771. (J.A. 311).**

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1961 as it read prior to October 1, 1982 and amended 28 U.S.C. § 1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. § 1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor

---

* References to the Appendix to the Petition are cited herein as "P.A.____".

** References to the Joint Appendix are cited herein as "J.A.____".

> may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

A. Prior Trials And Prior Appeals On The Merits.

Columbia Metal Culvert Co., Inc. filed the Complaint in this case in 1974, charging Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), as amended by the Robinson-Patman Act. The district court had subject matter jurisdiction over the substantive claim below pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331, 1337. Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("respondents") were later substituted as plaintiffs when Columbia Metal Culvert Co., Inc. ceased operations. Following the death of George M. Kerr, Jr., Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., was substituted as a party by Order of the district court, dated March 29, 1989.

Respondents tried their claims to a jury beginning in April, 1977. At the conclusion of respondents' case, the district court granted motions for a directed verdict in Kaiser's favor on all counts of the Complaint and entered judgment accordingly. The Court of Appeals reversed and remanded the case for trial. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). The case was bifurcated on liability and damages and tried on remand in July, 1979 before the district court and a jury. On August 16, 1979, the jury returned a verdict for respondents on liability. (J.A. 87). A few days later, the same jury awarded damages in the amount of $1,815,000.00. (J.A. 90). The district court trebled the damage verdict, and on August 22, 1979 entered a judgment in the amount of $5,445,000.00. (J.A. 91). Nearly two years later, the district court, by Memorandum and Order dated June 18, 1981, granted Kaiser's judgment

n.o.v. motion, in part, with respect to a portion of the respondents' damage claim. In addition, the district court granted Kaiser's motion for a new trial, but only as to damages. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981) (J.A. 92). The district court entered an Order vacating the August 22, 1979 damage judgment. (J.A. 128).

The new trial, limited to the issue of damages, was held in 1981. The jury returned a single damage verdict of $3,189,313.00 on December 2, 1981 (J.A. 145) and two days later, on December 4, 1981, the district court entered judgment in the trebled amount of $9,567,939. (J.A. 146). One year later, on January 17, 1983, the court granted Kaiser's motion for judgment n.o.v. as to a part of the damage award, vacated the December 4, 1981 judgment and entered judgment on January 18, 1983, in the trebled damage amount of $4,651,560. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983). (J.A. 147).

Respondents appealed from the part of the judgment granting defendants' motion for judgment n.o.v. on damages and Kaiser cross-appealed the liability issues. By Opinion dated December 27, 1984, the Court of Appeals for the Third Circuit reversed the district court's partial grant of judgement n.o.v. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). (J.A. 185). The Court of Appeals ordered that the January 18, 1983 judgment be vacated and ordered that the district court reinstate the December 4, 1981 judgment in the amount of $9,567,939. (J.A. 210). This Court denied Kaiser's Petition For a Writ of Certiorari on June 23, 1986, with Justice White dissenting. 477 U.S. 908 (1986).

On July 1, 1986, the Court of Appeals remanded the case to the district court (J.A. 209) and on July 2, 1986, the district court reinstated the judgment on the docket. (J.A. 53-54). On July 3, 1986, Kaiser paid the judgment.

The following is a summary of the relevant dates for purposes of this case:

April 1977	First trial and directed verdict for Kaiser on all counts
May 24, 1978	Court of Appeals reversal as to Kaiser on Sherman Act claims only; remand for trial
August 16, 1979	Liability verdict for respondents
August 21, 1979	Damage verdict
August 22, 1979	Judgment entered on trebled damage verdict ($5,445,000)
June 18, 1981	JNOV granted on damages and August 22, 1979 judgment vacated, new trial on damages ordered
December 2, 1981	Jury damage verdict ($3,189,313)
December 4, 1981	Judgment entered on trebled jury verdict ($9,567,939)
October 1, 1982	Effective date of amended 28 U.S.C. § 1961
January 17, 1983	JNOV granted in part on damage verdict
January 18, 1983	Judgment entered ($4,651,560)
December 27, 1984	Court of Appeals reverses partial JNOV with respect to Sherman Act § 2 claim only
June 23, 1986	This Court denies Petition For Writ Of Certiorari filed by Kaiser
July 1, 1986	Remand from Third Circuit ordering reinstatement of December 4, 1981 judgment ($9,567,939)
July 2, 1986	Court of Appeals Order entered on district court docket
July 3, 1986	Kaiser pays the judgment

B. The 1982 Amendment To The Federal Postjudgment Interest Statute, 28 U.S.C. § 1961.

Until October 1982, 28 U.S.C. § 1961 provided that post-judgment interest "shall be calculated . . . at the rate allowed by state law." As the district court noted, "[p]ostjudgment interest was calculated at the rate established by the state in which the federal court sat; Pennsylvania's post-judgment interest rate was at all relevant times 6% simple interest." (P.A.41-42).

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 (the "Act"), which included the amendment to § 1961 at issue here. Pub. L. No. 97-164, tit. III, pt. B, § 302, 96 Stat. 25, 55-56 (1982). The amendment changed the post-judgment interest rate to a uniform national interest rate "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment" (the "T-bill rate"). Under the amended statute, interest is compounded annually. In § 402 of the Act, Congress postponed for six months the Act's effective date, stating that, "[u]nless otherwise specified, the provisions of this Act shall take effect on October 1, 1982."

C. The Decision Of The District Court Concerning Post-judgment Interest.

On April 11, 1988, the district court awarded $2,632,886.30 in postjudgment interest to respondents. Applying the standard set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), the district court declined to apply the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date and, instead, applied that statute as it was in effect on December 2, 1981. The district court found that retroactive application of amended § 1961 in this case would result in manifest injustice to Kaiser. (P.A.45). Based in part on the fact that respondents represented to the Court of Appeals "that plaintiffs were entitled to interest only at the Pennsylvania legal rate both before and after" the effective date of amended

§ 1961, the district court found that "Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate." (P.A.46). In addition, the district found evidence, from the postponement of the effective date of the statute, that Congress did not intend that it apply retroactively. (P.A.46-48).

With respect to the date from which postjudgment interest should run, the district court rejected both parties' positions, holding that interest ran from December 2, 1981, the date of the damage *verdict* underlying the December 4, 1981 *judgment*. (P.A.41). Kaiser had argued that interest should not begin to accrue until the date the district court's judgment was reinstated on remand from the Court of Appeals in July, 1986. Respondents had argued that interest should run either from the 1979 liability verdict or from the 1979 vacated damage judgment.

D. The Decision Of The Court Below Concerning Postjudgment Interest.

On the question of retroactivity, a divided panel of the Court of Appeals, in an Opinion authored by Circuit Judge Cowen, also applied *Bradley*. However, the Court of Appeals reversed the district court's holding that the language of amended § 1961 and its legislative history indicated that it should apply only to judgments entered after its effective date. It found "ambiguous" Congress' move to postpone the effective date of amended § 1961. (P.A.19). It also reversed the finding of the district court that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals focused on respondents' rights, rather than on Kaiser's rights, stating that respondents' "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. . . ." (P.A.22).

Circuit Judge Stapleton dissented, explaining that he would confine the application of amended § 1961 to judgments entered after its effective date, relying on the reasoning of the Second Circuit in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984). Judge Stapleton found significant evidence from the terms of the statute that Congress did not

intend the amendment to be applied to judgments entered before its effective date. He said: "Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment." (P.A.27). Additionally, noting the fact that Congress postponed the effectiveness of this statute for six months, Judge Stapleton observed that "Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates." (P.A.27). He therefore deduced that "Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates." (P.A.27).

The Court of Appeals affirmed the portion of the district court's decision which held that postjudgment interest should be calculated from the December 2, 1981 damage *verdict*, rather than from the date of the *judgment*, as the statute provides. Notwithstanding the fact that the "delay" between verdict and entry of a judgment was only two days, the Court of Appeals held that the district court "correctly revised its decision to conform with *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment." (P.A.14).

Kaiser filed a petition for rehearing and suggestion of rehearing *in banc* for reconsideration of (1) the holding of the panel majority in light of this Court's December 12, 1988 decision in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), which reaffirmed the holding of *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), and which was not cited or distinguished in the panel majority's January 9, 1989 Opinion; (2) the holding of the panel majority in light of two prior conflicting decisions of the Court of Appeals for the Third Circuit; and (3) the panel majority's decision that *Bradley v.*

Richmond School Board, 416 U.S. 696 (1974), required application of the 1982 amendments to 28 U.S.C. § 1961 to a judgment entered prior to its effective date.

The petition for rehearing was denied by the Court of Appeals on February 13, 1989, with a notation that Judges Stapleton, Becker and Hutchinson would have granted rehearing *in banc*. (P.A.29).

Kaiser's motion for a stay of mandate pending application to this Court for a Writ of Certiorari was granted by the Court below, by Order dated February 27, 1989, staying the mandate until March 30, 1989.

Kaiser filed the Petition For A Writ Of Certiorari on March 30, 1989. Respondents filed their Conditional Cross-Petition For A Writ Of Certiorari on April 28, 1989. Both the Petition and the Conditional Cross-Petition were granted by this Court on June 19, 1989. (J.A.311).

E. The Effect Of The Decision Of The Court Of Appeals.

The district court's decision to calculate postjudgment interest from December 2, 1981 at the six percent simple interest rate prescribed by the pre-amendment version of 28 U.S.C. § 1961 resulted in postjudgment interest in the amount of $2,632,886.30.

The Court of Appeals' holding that amended § 1961 applied increased Kaiser's liability for postjudgment interest by more than $6 million to over $8.5 million. Moreover, because amended § 1961 calls for compound interest, under the Court of Appeals' holding, interest continues to run at a rate of thousands of dollars per day, even though Kaiser paid the judgment in full one day after the judgment was reinstated on the district court docket.

There is some uncertainty as to the precise amount of postjudgment interest that would be due under the T-bill rate. The uncertainty stems from an argument which respondents first raised after the decision of the Court of Appeals. According to respondents, the November 25, 1981 T-bill auction, which pursuant to amended § 1961 would trigger a change in the

appropriate interest rate, did not "settle" until December 3, 1981. Respondents argue that the "settlement" date, not the auction date, changes the applicable postjudgment interest rate.[1] The damage verdict in this case, which both the district court and the Court of Appeals chose to begin the accrual of postjudgment interest, was returned on December 2, 1981 and judgment was entered upon it on December 4, 1981. Respondents' present position is that the interest rate changed from 14.84 percent to 11.58 percent on December 3, 1981. If respondents' argument prevails, the interest owing on a December 2, 1981 damage verdict would be over $12 million, while on a December 4, 1981 judgment, the postjudgment interest would be under $9 million. Therefore, the decision to measure interest from the date of the *verdict*, rather than from the date of entry of *judgment*, is potentially a $4 million question of statutory construction.

If this Court reverses the decision below that amended § 1961 applies retroactively to judgments entered prior to its effective date, and instead holds that Pennsylvania's six percent simple interest rate applies, the choice between December 2, 1981 and December 4, 1981 is no longer a meaningful issue, as the difference in interest would be negligible in this case.

SUMMARY OF ARGUMENT

I.

Under the standard set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), the 1982 amendment to the federal postjudgment interest statute, 28 U.S.C. § 1961, should not be applied to the calculation of interest on judgments

1. Kaiser disputes respondents' position. The Administrative Office of the United States Courts, which is responsible for informing federal judges of the change in the § 1961 postjudgment interest rates, has considered the question and has concluded that the auction date is the appropriate date on which to change the postjudgment interest rate. (P.A.66). No court has ruled on this question. The Court of Appeals below declined to rule on this aspect of respondents' construction of the statute and remanded that issue to the district court for consideration in the first instance. (P.A.74).

entered prior to its effective date. *Bradley* requires retrospective application of "current law" by an appellate court only (i) if the terms of the statute or its legislative history do not indicate a contrary intent of Congress, or (ii) if application of current law would not result in manifest injustice. In this case, Congress' intent that the statute only apply to judgments entered after its effective date is clear. Congress delayed the effective date for six months after the enactment of the statute, and statements in the legislative history show that Congress specifically provided a "transition period". Postponement of an effective date is inconsistent with an intent that a statute apply retroactively and shows that Congress had a countervailing concern for the reliance interests of litigants who had made or would make decisions with respect to appeals or the payment of judgments based on the pre-amendment rates.

Such a concern would be justified in a situation such as this case. Application of amended § 1961 to the December 2, 1981 damage verdict, the event selected by the lower courts to trigger the accrual of interest, would be unfair to Kaiser. In fact, the district court specifically found, as a fact, that it was the understanding of the parties and the district court that any postjudgment interest was accruing at the state law rates prescribed in the pre-amendment version of § 1961. Holdings by other federal courts and the position adopted by the Administrative Office of the United States Courts are consistent with and reinforce this understanding. In making postjudgment decisions to appeal or pay the judgment, Kaiser clearly had a right to assume that interest ran at Pennsylvania's six percent simple interest rate. Application of amended § 1961 retroactively to the judgment in this case entered prior to its effective date is manifestly injust to Kaiser. This manifest injustice displaces the presumption of retroactivity under *Bradley*.

II.

This Court recently reaffirmed the traditional bias against retroactive laws in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), where it stated that "congressional

enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 471. The Court in *Bowen* relied on *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), suggesting that the well-founded bias against retroactivity fully applies where the law changes while a case is pending on direct review. *Bowen* appears to conflict with *Bradley*.

Bowen is the better view. The *Bradley* standard, with its case-by-case analysis of possible manifest injustice, requires courts to forever revisit the applicability of a new statute. In addition, because the governing law may depend entirely upon the fortuitous timing of the appeal process, the *Bradley* rule produces arbitrary and unfair results. Moreover, it assumes that Congress *intends* these arbitrary and unfair results. The *Bradley* presumption in favor of applying current law should be clearly and unequivocably replaced with the traditional presumption that statutes do not operate retroactively unless Congress explicitly so provides.

III.

The holding of the Court below that 28 U.S.C. § 1961 requires calculation of postjudgment interest from the date of the *verdict* squarely conflicts with the explicit terms of the statute, which provides unambiquously that interest shall be calculated "from the date of entry of the *judgment*". 28 U.S.C. § 1961. Where a statute is not ambiguous and where no exceptional circumstances are present, courts should not construe a statute contrary to its plain language.

Fed. R. App. P. 37 confers no discretion to depart from the explicit statutory terms of § 1961. Rules of court must conform to Acts of Congress, or they are invalid. Rule 37 may not be construed in a way that renders it inconsistent with § 1961. *See* 28 U.S.C. § 2071. To the extent that Rule 37 confers any discretion, therefore, it only allows a choice among the competing *judgment* dates in this case from which to measure postjudgment interest — July 2, 1986, the date judgment was reinstated

on the district court docket, or December 4, 1981, the date the reinstated judgment was originally entered. In a case such as this, where respondents' success was not clear cut, where respondents' own conduct at trial contributed substantially to the length of the proceedings and the necessity for retrial, and where the treble damage recovery more than adequately ensures that respondents will be fully compensated, the equities clearly favor measuring interest from the date the previously vacated judgment was reinstated.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF *BRADLEY V. RICHMOND SCHOOL BOARD.*

The Court below used the test set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), to evaluate whether amended § 1961, the statute which changed the method for calculating postjudgment interest on judgments entered in federal district court, applies retrospectively to judgments entered prior to its effective date. Assuming *Bradley* provides the proper framework to decide this case,[2] the Court below erred in its application and interpretation of *Bradley*.

In *Bradley*, this Court announced "the principle that a court is to apply the law in effect at the time it renders its decision," unless (1) there is legislative history to the contrary; *or* (2) there is statutory direction to the contrary; *or* unless (3) doing so would result in "manifest injustice." 416 U.S. at 711. To displace the *Bradley* presumption of retroactivity, a party need only demonstrate the applicability of one of these three exceptions. *Id.*

The majority of the panel in the Court below erroneously concluded that not one of the *Bradley* exceptions applied in this case. It therefore held that *Bradley* compelled application of amended § 1961 to the December 2, 1981 damage verdict

2. Kaiser contests the viability and applicability of the *Bradley* standard in light of later decisions of this Court. *See* § II, *infra*.

chosen to begin the accrual of postjudgment interest, even though this date preceded the effective date of the new statute.

The decision of the Court of Appeals should be reversed. Retroactive application of amended § 1961 is contrary to both the intent of Congress and the specific terms of amended § 1961. In addition, the Court's application of the amendment here results in manifest injustice to Kaiser. Accordingly, this case falls within all three exceptions to *Bradley* and the Court of Appeals erred in calculating postjudgment interest in this case based on the rate prescribed in amended § 1961.

A. The Statutory Language And Legislative History Of Amended § 1961 Show That Congress Intended That The Amendment Apply Prospectively Only.

Amended § 1961 is not silent as to whether it should apply retroactively. Congress not only included a specific effective date, it chose to *delay* the effective date for six months until October 1, 1982. The postponed effective date shows that Congress did not intend the statute to apply retroactively, as retroactive application of a statute with a postponed effective date is irrational, produces unfair results and is contrary to any conceivable intent of Congress. It absurdly hypothecates that Congress intended to discriminate between holders of identical judgments entered on the same day, based upon whether an appeal or other postjudgment proceeding extended beyond the delayed effective date. Judge Stapleton, dissenting below, recognized this irrationality, stating that he was "unwilling to attribute to Congress an intent to discriminate between the holders of simultaneously entered judgments based on whether their appeals were still pending on the effective date of the Act." (P.A.27).

The decisions of this Court reflect recognition that a delayed effective date indicates Congress' intent to apply a statute prospectively only. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), this Court explicitly equated a delayed effective date with prospectivity:

> In 1974, *Congress underlined the importance of making only gradual and prospective changes in the rules that govern* pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. *The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted.*

Id. (emphasis added). *Accord Malone v. White Motor Corp.*, 435 U.S. 497, 517 (1978) (delayed effective date shows Congress' concern over impact of legislation if applied retroactively). On a number of occasions, this Court has inferred nonretroactivity of a statute from the mere fact that the statute had an effective date, regardless of whether it was a *delayed* effective date. *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 641 (1985). *See also Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 630 (1985) (Stevens, J., dissenting).

The lower courts consistently hold that an effective date, especially a postponed effective date, indicates that a statute should be construed to apply only prospectively. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986) (explicit provision for effective date of Cable Act warrants prospective application of Act); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983) ("[i]t would seen anomalous for the legislature to defer the effective date of the Act [Copyright Act of 1978] if it intended the statute, when implemented, to govern retrospectively"); *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir. 1981) ("[i]t is unlikely that Congress would delay the effective date of Amendments which are to be applied retroactively"). *See generally* Sand, *Sutherland Statutory Construction*, § 33.07 (4th ed. 1986) ("A statute with a definite effective date commences operation from that time").

With respect to the statute at issue in this case, the Courts of Appeals for the Fifth and Ninth Circuits, as well as the dissenting judges in the Sixth Circuit and in the Court below,

noted that the postponement of the effective date indicated that Congress intended that amended § 1961 should only apply to judgments entered after the effective date. *See Campbell v. United States,* 809 F.2d 563, 573-74 (9th Cir. 1987); *Brooks v. United States,* 757 F.2d 734, 742 (5th Cir. 1985); *Bailey v. Chattem, Inc.,* 838 F.2d 149, 156 (6th Cir.), *cert. denied,* 108 S. Ct. 2831 (1988); *Bonjorno,* (P.A.26-27). Kaiser submits that the majority of the Court below erred when it came to the opposite conclusion, finding Congress' deliberate postponement of the effective date too "ambiguous" to warrant displacing the *Bradley* presumption. (P.A.19).

Further support for prospective-only application of amended § 1961 is found in the legislative history. With respect to the effective date, the Senate report states that "[t]he delay is intended to provide time for planning the transition and for permitting the bar to become familiar with the provisions." S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 42. In addition, the sponsor of a successful amendment to the Senate bill that extended this delay date stated:

> This amendment would provide additional time for the new courts to make necessary policy, procedural, and personnel changes. It will also allow further time for the Federal court system, administrative agencies, patent holders, the practicing bar, and the business community to become more familiar with the new changes in law and procedures, and will allow greater input by affected parties into the administrative changes required by the bill. The additional time will also allow the courts to provide for a smoother transition based on greater professional and public knowledge of the changes in law.

Campbell, 809 F.2d at 574 (quoting 127 Cong. Rec. 29,896 (1981) (statement of Sen. Grassley)). Again, it would be illogical to give the public more time for a "transition" if Congress intended the statute to apply to events, conduct or judgments occurring prior to the enactment of the law or its effective date. *See Aaacon Auto Transport, Inc. v. I.C.C.,* 792 F.2d 1156, 1161

(D.C. Cir. 1986), *cert. denied,* 481 U.S. 1048 (1987) (congressional statement that legislative changes "should be implemented with the least amount of disruption" supported departure from the *Bradley* presumption of application of current law). As Judge Stapleton explained in dissent below:

> Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates. This decision suggests to me that Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates.

(P.A.27).

Finally, an exclusively prospective construction of amended § 1961 comports with the wording of the statute which establishes a method for determining the applicable interest rate which is tied to the date of entry of judgment. At least two courts have found an indication that Congress intended only prospective application from the fact that the rate is "tied inextricably to the date the judgment enters." *Litton,* 746 F.2d at 175; *Brooks v. United States,* 757 F.2d 734, 742 (5th Cir. 1985).[3]

The Court below erred in applying the "*Bradley* presumption" in the face of the clear indications from both the language of the statute and its legislative history that Congress intended

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3. Congressional intent to apply amended § 1961 prospectively can likewise be gleaned from the forward-looking statements in the Senate Report that the new rate "*would be*" keyed to market rates and that the "new interest rate on judgments *will apply* uniformly. . ." S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21-22 (emphasis added). In *Bennett v. New Jersey,* 470 U.S. 632 (1985), this Court found very similar language in the legislative history of a different statute indicated that Congress did not intend the *Bradley* rule to apply. *Id.* at 641 (report stated that new laws clarified "manner in which school districts *are to distribute* Title I funds. . .").

that amended § 1961 should apply only to the calculation of postjudgment interest on judgments entered after its effective date.

B. Amended § 1961 Should Not Apply Here Because This Case Fits Within The "Manifest Injustice" Exception To The *Bradley* Rule.

The *Bradley* presumption also does not apply in this case because its application would be unjust to Kaiser. This exception to *Bradley* stems from the statement in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties. . ." 5 U.S. at 110. The *Schooner Peggy* Court also explained that manifest injustice would be more likely to result from retroactive application of current law in cases not involving "great national concerns."

Based on these remarks in *Schooner Peggy*, the Court in Bradley set forth three elements to determine whether manifest injustice would result from retroactive application of a statute: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change of the law upon those rights. 416 U.S. at 717. The district court in this case properly applied these factors and concluded that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals erred in overturning the decision of the district court and its decision should be reversed.

1. This Case Involves Private Parties And Does Not Implicate "Great National Concerns".

The district court made the correct initial observation that the parties to this action are *private parties* and that an action by an individual litigant to obtain an increase in postjudgment interest rates does not implicate "great national concerns." (P.A.45). The conclusion of the district court comports with that of the Second Circuit in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168, 175 (2d Cir. 1984), where that court

stated that "[w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, *there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest.*" (Emphasis added).

By contrast, the Court of Appeals in this case came to the startling opposite conclusion that, because a civil antitrust plaintiff assumes the role of a private attorney general by aiding in the enforcement of the antitrust laws in the merits portion of the case, "an action to increase the rate at which post-judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests." (P.A.21). The illogical effect of the holding of the Court of Appeals is to transform every statute construed or applied in an antitrust case — cases which could continue for years and encompass a host of substantive and procedural statutes and regulations — into statutes implicating "great national concerns" and to thereby afford the antitrust plaintiff an advantage when the court construes those statutes. This approach does not comport with *Bradley*, with *Schooner Peggy* or with logic, and should be rejected by this Court.

In *Bradley*, the Court found that the specific attorney's fee statute at issue, § 718 of the Education Amendments of 1972,[4] which applied only to successful school desegregation litigation, had "to do with the 'great national concern' " of vindicating "a national policy of high priority." *Id.* at 720. The Court recited Congress' great concern that because the Civil Rights Act of 1964 did not include damages as a remedy, its private enforcement would be unlikely absent some incentive. *Id.* Section 718 was enacted as that incentive. Here, no similar claim is made with respect to § 1961. Unlike § 718, § 1961 is a statute of general application which applies to all money judgments recovered in federal district court and is not tied to antitrust cases or to any other specific type of litigation. Indeed, it applies with

4. *Previously codified at* 20 U.S.C. § 1617, 86 Stat. 369, *repealed by* Pub. L. No. 97-35, Title V, § 587(a)(1), 95 Stat. 480 (1981).

equal force in diversity cases where no federal statutes are implicated on the merits. Respondents argue that § 1961 is imbued with "great national concern" *only* because it is being construed in the context of an antitrust case.

The statute of "great national concern" in *Schooner Peggy* was a treaty implicating international relations and the avoidance of potential war with France. *Schooner Peggy* cannot reasonably be read to mean that the mere fact that Congress chose to enact a statute on any subject shows that the statute implicates "great national concerns" comparable to war with France. Otherwise, the "manifest injustice" exception would be meaningless in every case construing a federal statute or regulation.

The Court of Appeals wrongly relied upon *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985). In *Mitsubishi*, Soler, one party to an international arbitration agreement, sought to avoid arbitration and bring an antitrust case in the United States court system. Soler argued that the private attorney general aspect of the antitrust laws was so central to American antitrust policy that a party should be entitled to a U.S. judicial forum regardless of having agreed to arbitrate. This Court *rejected* Soler's argument that it should have the ability to circumvent the arbitration agreement based on consideration for its role as a private attorney general. *Id.* at 635-36. The construction of the postjudgment interest statute, like the enforceability of the arbitration agreement in *Mitsubishi*, should not depend on the subject-matter of the claims in the case.

The rate of postjudgment interest affects only the private interests of judgment holders and creditors. The change in the rate effectuated by amended § 1961 may have affected some individual litigants, but does not implement an important national policy or implicate matters of great national concern. The Court below erred in concluding to the contrary.

2. Application Of Amended § 1961 Would Be Unfair And Infringe Upon Kaiser's Rights.

The Court of Appeals also erred in rejecting the district court's analysis of the nature of Kaiser's rights and the impact of applying amended § 1961 on those rights. The district court correctly evaluated the nature of Kaiser's rights and found that "Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate." (P.A. 46). The district court reached this conclusion based in part upon representations which respondents made to the Court of Appeals on March 15, 1985, *"two and one-half years after the effective date of amended § 1961."* (P.A.46). In connection with a motion to expedite a previous appeal in this case, respondents stated:

> *Interest is accruing on this judgment at a rate of only six percent,* compared to substantially greater rates of money market interest. *Section 1961(a) of Title 28 U.S.C., as amended in 1982, is apparently not retroactive to judgments,* such as the 1981 judgment in the present case, entered prior to the effective date of the 1982 amendment. The continuing prejudice to the plaintiffs-appellants of a noncompensatory rate of interest, extending through the summer recess of the Supreme Court, is unfair. (Emphasis added).

(P.A.46). While the district court did not find respondents estopped from contradicting this representation — as it might have — it found that this statement illustrated "the common understanding of both parties and this court." (P.A.46). Therefore, the district court rightly concluded that Kaiser was justified in relying on this understanding.

The evolving body of case law, both in the Third Circuit and elsewhere, supported Kaiser's right to assume that interest ran at Pennsylvania's six percent simple interest rate. Prior to its decision in this case, the Court of Appeals for the Third Circuit had twice before ruled on the question of whether amended § 1961 should be applied to judgments entered prior to its effective date, and twice it decided that it *should not.*

In *United States ex rel. Billow v. E.J.T. Construction Co.*, No. 83-1190, Slip op. (3d Cir. Feb. 7, 1984), the Court of Appeals said:

> The district court ruled that the new market based rates for postjudgment interest *should not apply to judgments entered prior to the effective date of the amendment* (October 1, 1982).
>
> *We find no error in the decision of the district court.*

Id. at 3. (Emphasis added).

Later in 1984, the Court of Appeals, in a published opinion, again addressed the issue. *See Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985). In *Devex*, the district court awarded damages in 1980. This Court affirmed the damage judgment in 1981. In 1983, the district court applied the prior version of § 1961 and awarded postjudgment interest pursuant to state law from 1980, holding that the amendment to § 1961 did *"not impact upon this case because it did not take effect until October 1, 1982, well after judgment was entered."* 569 F. Supp. 1354, 1365-66 n.2 (D. Del. 1983). In 1984, noting that Congress had amended § 1961 as of 1982, the Court of Appeals affirmed the district court and applied the prior version of § 1961, stating that "28 U.S.C. § 1961 provides only that postjudgment interest 'shall be calculated from the date of the entry of the judgment, *at the rate allowed by State law.*' " 749 F.2d at 1023, 1024 n.5.

Four other Courts of Appeals came to the same conclusion. *See Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168, 175 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943 (7th Cir. 1984); *United States v. Dollar Rent A Car Sys.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *see also Peterson v. Crown Fin. Corp.*, 553 F. Supp. 114, 116-17 n.4 (E.D. Pa. 1982). *Cf. United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (one factor in whether to apply a judicial decision retroactively is the settled nature of the law prior to the decision); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971).

Kaiser's reliance interest was further reinforced by the position of the Administrative Office of the United States Courts. As early as 1982, the Administrative Office of the United States Courts declared that the new rate of postjudgment interest would apply only to judgments entered on or after October 1, 1982. (P.A.57). Indeed, the Administrative Office did not and does not provide district courts with T-bill rates applicable for time periods prior to October 1, 1982. (P.A.59-65). The opinion of the specific administrative agency charged with administering the postjudgment interest statute illustrates the practice of federal courts nationwide in implementing the transition from the prior version to amended § 1961. It clearly was an appropriate factor for Kaiser to take into consideration in making postjudgment decisions. *Brooks*, 757 F.2d at 742; *Litton*, 746 F.2d at 174.

The district court also correctly determined that application of the intervening change in § 1961 would impose additional and unforeseeable obligations upon Kaiser, another factor that *Bradley* held militates against application of current law. (P.A.46-47). In *Bradley*, this Court concluded that there was no reason to believe that the defendant, had it been aware of the new statutory obligation, would have acted any differently. 416 U.S. at 721. The same cannot be said here. The district court properly recognized that Kaiser might well have acted differently "had it realized its new statutory obligation on October 1, 1982." (P.A. 46). The court explained that although the "appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending," Kaiser "might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%." (P.A.47). The Court of Appeals for the Second Circuit came to the same conclusion in a case virtually identical to this one. *See Litton Systems, Inc. v. A. T. & T*, 746 F.2d 168, 176 (2d Cir. 1984).

The district court correctly concluded that "[i]t would be manifestly unjust to Kaiser to apply amended § 1961 by calculating interest at the higher T-bill rate as of October 1, 1982 or any time prior thereto when the amendments to § 1961 did not become effective until October 1, 1982." (P.A.47).[5] The contrary decision of the Court of Appeals should be reversed.

II. THE COURT BELOW ERRED IN APPLYING A PRESUMPTION IN FAVOR OF RETROACTIVE CONSTRUCTION OF STATUTES CONTRARY TO THIS COURT'S RECENT HOLDING IN *BOWEN V. GEORGETOWN UNIVERSITY HOSPITAL.*

Retroactive application of amended § 1961 was erroneous under the standard set forth in *Bradley* — a standard which appears to establish a presumption *in favor of* retroactive application of legislation. However, less than one year ago, this Court unanimously declared and reaffirmed the existence of a firm presumption against retroactive construction of statutes, stating that *"congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 471 (1988) (emphasis added). Notwithstanding *Bowen*, the Court of Appeals in this case applied the directly contrary *Bradley* rule of statutory construction without either citing or distinguishing this Court's language in *Bowen*.[6]

5. The Court of Appeals did not identify or address Kaiser's rights at all. Instead, it simply stated that *respondent's* "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments." (P.A.22). Kaiser respectfully suggests that this statement by the Court of Appeals shows that the Court erred in beginning the accrual of postjudgment interest *prior* to "the final controlling judgment on the merits" — *i.e.*, July 2, 1986. If interest is measured from July 2, 1986, Kaiser agrees that the 1982 amendment to § 1961 applies and interest runs at the appropriate T-bill rate for that date.

6. The Court of Appeals did note, however, that "at first glance," the *Bradley* presumption "seems inconsistent" with the "long-standing rule of statutory construction that statutes are presumed to have only 'prospective' effect and will be given 'retroactive' effect only if there is affirmative legislative direction to do so." (P.A.17).

Kaiser submits that, in light of *Bowen*, the Court of Appeals' holding that *Bradley* controlled the outcome should be reversed.

A. The Law Of This Nation Traditionally Has Disfavored Legislation That Has Retroactive Effect.

This Court in *Bowen* articulated and applied the ancient bias against retroactive laws. Retroactive statutes have been disfavored and considered unfair and oppressive since antiquity. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936) (cited with approval in Justice Scalia's concurrence in *Bowen*, 109 S.Ct. at 479). Roman and Greek law incorporated this distaste for retroactive laws and British common law courts "applied the bias against retroactivity as a guide to the construction of statutes." Smead, *supra*, at 775-76.

The universal aversion to retroactive laws stems from the consensus that notice or warning of a new rule should be given in advance of actions or events whose effects are to be judged. *See* Sand, *Sutherland Statutory Construction*, § 41.02 (4th ed. 1986). "The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known." *Id.* It is perceived as unfair when the legislature changes the legal status or consequences of past events or transactions. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio N.U.L. Rev. 253, 258 (1983).

American law "borrowed this principle and it soon became recognized as a rule of construction which our courts would follow in interpreting statutes. . . . Retroactive laws were held to be oppressive and unjust, and it was maintained that *the essence of a law was that it be a rule for the future.*" Smead, *supra*, at 780 (and cases cited therein). (Emphasis added). *Accord* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692-93 (1960) (listing reasons for the traditional bias against retroactive legislation).

From their inception, therefore, American courts have refused to give legislative acts retroactive effect unless their express language so provided. *Dash v. Van Kleek*, 7 Johns (N.Y.) 477, 5 Am. Dec. 291 (1811) (Kent, J.) ("A statute ought never to receive such a construction, if it be susceptible of any other. . .").

As early as 1806, this Court declared that:

> Words in a statute ought not to have retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the preexisting situation of the parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms and the manifest intention of the legislature.

United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806). Since *Heth*, this Court has consistently reiterated its distaste for retroactive legislation. *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See Miller v. United States*, 294 U.S. 435, 439 (1935); *Shwab v. Doyle*, 258 U.S. 529, 534 (1922); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 577 (1906); *White v. United States*, 191 U.S. 545, 552 (1903); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798) (opinion of Paterson, J.). *See* Smead, *supra*, at 781 n.22 (listing 29 Supreme Court cases adhering to this principle of statutory construction). *Cf. Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D. N.H. 1814) (No. 13,156) (opinion of Story, J.). This Court recently referred to the presumption that statutes operate only prospectively as the "first rule of construction." *United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982).

The presumption has been applied by this Court regardless of whether the law was passed before a case arose or during the time a case was pending. *See Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276

U.S. 160, 162-63 (1928). *See also* Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law. 215, 217-18 (1986). In *Greene v. United States*, 376 U.S. 149 (1964), for instance, the plaintiff sued the government alleging that his security clearance had been unlawfully revoked. After he had instituted a claim, but before a determination of the appropriate remedy, the regulations governing the procedure for obtaining restitution were changed. Despite the fact that the law had changed while the case was pending and the new regulations were "current law" at the time of the decision, this Court adhered to the "first rule of construction" that new laws apply prospectively only, and held the new regulations inapplicable. *Id.* at 160.

Likewise, in *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), this Court adhered to the presumption that statutes should be construed to apply only prospectively even when the statute at issue was enacted while the case was pending. In 1923, the Commissioner of Internal Revenue determined that respondent Magnolia had overpaid taxes for the years 1917 and 1918 and issued certificates for the return of those amounts. The certificates stated that "interest status will be determined as soon as necessary data can be assembled." 276 U.S. at 161. In 1924, Congress enacted a new statute changing the applicable method of calculating interest. The Commissioner paid interest calculated pursuant to the method prescribed in the prior statute. Magnolia sued, contending that, "as the interest had not yet been paid [it] became entitled to an amount calculated according to the later enactment." Id. at 162.

This Court rejected Magnolia's contentions, noting that both statutes provided: "[u]pon the allowance of" a refund, "interest shall be allowed. . ." *Id.* The Court identified October 11, 1923 — a date prior to the enactment of the new statute — as the date of "allowance", regardless of the fact that the interest was not yet paid on that date. It stated that there was "nothing to suggest that [the new statute] was intended to change the rule as to refunds theretofore allowed." *Id.* The Court held that the new statute would not be applied to refunds if the "allowance" date fell before the enactment of the new statute because

"[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purposes so to do plainly appears." Id. at 162-63 (emphasis added). The *Magnolia* case is directly analogous to this case. Like the "allowance" date there, the "judgment" date chosen to begin the accrual of interest in this case fell prior to the enactment or effective date of amended § 1961.

Under the reasoning of *Magnolia* and *Greene*, and the many other cases adhering to the traditional bias against retrospective application of statutes, the prior version of § 1961 should be presumed to govern the calculation of postjudgment interest on judgments entered prior to its amendment and interest should be calculated in this case at the Pennsylvania rate of six percent. The Court of Appeals' reliance on a contrary presumption to come to the opposite result should be reversed.[7]

7. Application of the traditional presumption that a statute applies only prospectively does not turn on whether retroactive application would disturb "vested" rights. Even putting aside the esoteric question of distinguishing between "vested" and "unvested" rights, *see* Smith, *Retroactive Law and Vested Rights*, 5 Tex. L. Rev. 231 (1927), this argument misses the mark.

When a statute does not on its face apply retroactively, the court first must determine whether Congress intended it to apply retroactively. In the absence of clear legislative direction, a court applies the principles and presumptions of statutory construction, including the presumption that Congress does *not* intend retroactivity, as a guide to legislative intent. *See* Sand, *Sutherland Statutory Construction*, § 45.13 (4th ed. 1986). If congressional intent to apply the law retroactively is clear, the court evaluates the effect retroactive application will have on the parties and their rights, including whether the rights are vested. It must then determine if the intended retroactive effect is constitutional or whether it runs afoul of the Due Process Clause or one of the specific constitutional provisions designed to eliminate unfairness of this kind. *See* U.S. Const. article 1, section 9, clause 3; *id. section 10, clause 1* (ex post facto laws, bills of attainder, impairment of contracts); *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 730 (1984) ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects" and it is more difficult for it to pass constitutional muster).

Commentators uniformly agree on this dual approach to the question of retroactivity. *See, e.g.*, DeMars, *Retrospectivity And Retroactivity of Civil Legislation Reconsidered*, 10 Ohio N.U.L. Rev. 253, 259 (1983); Smead, *The Rule Against Retroactive Legislation*, 20 Minn. L. Rev. at 776, 789, 791; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960); Sand, *Sutherland Statutory Construction*, § 41.02 (4th ed. 1986).

B. The *Thorpe* And *Bradley* Decisions.

Intervening in the midst of the consistent judicial bias against retroactive statutes, are this Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). Relying primarily on *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), and without reference to the traditional presumption against retroactivity, the *Thorpe* and *Bradley* decisions announced a presumption that current law applies to any case before it, regardless of the law in effect at the time the pertinent events or conduct occurred.

In *Thorpe*, a tenant in a federally-assisted housing project contended that she was being evicted because she had exercised her First Amendment rights and that the eviction was therefore unconstitutional. At the time the landlord initiated the eviction, as well as while the case was in the district court and the Court of Appeals, the law did not require the landlord to state any reasons for eviction. No reasons had been given in this instance. Under these prior standards, the tenant's arguments had been rejected. However, while the case was pending before this Court, the Department of Housing and Urban Development ("HUD") issued a directive requiring notice of the reasons for eviction and an opportunity by the tenant to respond prior to eviction from a federally-assisted housing project. *Id.* at 270-73. This Court remanded the case for reconsideration in light of the new HUD directive, but the lower courts on remand construed the directive not to apply when "[a]ll critical events" relevant to the eviction process occurred prior to its issuance.

This Court reversed, holding that the HUD directive applied. The Court relied on the so-called "general rule", derived from *Schooner Peggy*, that "an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. at 281. Without referring to the critical fact that the legislation in *Schooner Peggy* applied retroactively by its own

terms, the Court stated that this "same reasoning has been applied where the change was constitutional, statutory[8], or judicial." *Id.* at 282.

The Court's only reference in *Thorpe* to any of the host of decisions applying the presumption *against* retroactive application of legislation came in a footnote where, without explanation, the Court characterized one of those cases, *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the *Schooner Peggy* presumption for cases in which its operation would work "manifest injustice." 393 U.S. at 282 n.43.[9]

In *Bradley*, the Court likewise relied on *Schooner Peggy* to justify a presumption in favor of retroactive application of legislation. *Bradley* involved the propriety of an attorney's fee award in litigation over the desegregation of the Richmond, Virginia, public school system. While the issue of the availability of attorney's fees was before the Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, *previously codified at* 20 U.S.C. § 1617, which gave federal courts the authority to award a prevailing party a reasonable attorney's fee when appropriate upon entry of a final order in a school desegregation case. This Court held that § 718 could be applied retroactively to services rendered prior to its enactment, "where the propriety of a fee award was pending resolution on appeal when the statute became law." *Id.* at 710.

8. It should be noted that the case cited by the Court for the proposition that this principle extends to statutory changes dealt with a statute, like the statute in *Schooner Peggy*, that specifically provided that it applied to pending cases. *Carpenter v. Wabash R.R. Co.*, 309 U.S. 23, 26 (1940).

9. The Court's characterization of *Greene* was clearly not compelled by, nor even consistent with, the language of that decision. On the contrary, the Court in *Greene* declared its adherence to a *general rule*, not an exception, stating that it applied the "first rule of statutory construction" that "legislation must be considered as addressed to the future, not to the past . . .' " 376 U.S. at 160 (quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

While the Court in *Bradley* appeared to reject the presumption that statutes apply only prospectively in the absence of legislative direction to the contrary, it is significant that in *Bradley*, as in *Schooner Peggy*, there was evidence that Congress intended the statute to apply retroactively. Indeed, the *Bradley* court identified in the legislative history of § 718 "at least implicit support for the application of the statute to pending cases." 416 U.S. at 716. Congress had specifically *deleted* a provision in the statute which provided that it would apply only to services rendered after the enactment date. *Id.* at 716 n.23. The Court observed that "while there is no explicit statement that § 718 may be applied to services rendered prior to enactment, we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id.*

As in *Thorpe*, the Court inexplicably referred to the result in *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the general rule, where retrospective application would bring about "manifest injustice." 416 U.S. at 717 n.24.

C. This Court's Recent Reaffirmation Of The Traditional Rule Of Construction Against Retroactive Application Of Statutes Requires Reversal Of The Decision Of The Court of Appeals.

Perhaps due to the difficulties inherent in the *Bradley* standard and its apparent conflict with the traditional bias against retroactivity, this Court's decisions involving the retroactivity of legislation since *Bradley* have exhibited some inconsistency.

This Court has only once invoked the "*Bradley* presumption" to construe a rule of law retrospectively. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (Powell, J.).[10] Significantly, that case did not involve the construction of

10. In *Cort v. Ash*, 422 U.S. 66, 76-77 (1975), the Court mentioned *Bradley* and *Schooner Peggy*, but the case did not involve retroactivity. The Court simply held that the 1974 Amendments to the Federal Elections Campaign Act would govern applications for injunctive relief with respect to all presidential elections which occurred *after* it was enacted.

a statute. Instead, the rule at issue in that case was established by *judicial decision*, and the Court has consistently distinguished between the appropriate retroactivity analysis in these two contexts. Judicial decisions have generally carried a presumption of retroactivity, while legislation traditionally applies only prospectively. *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student").[11] *See also* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960) ("there is the strong common-law tradition that although a court's pronouncements may apply to past conduct, a legislature's functions is to declare law for the future").

By contrast, on three occasions, this Court has refused to permit retroactive application of a newly-enacted law to a pending case. In *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985), the Court, in an Opinion authored by Justice O'Conner, found it unnecessary to reconcile *Bradley* with the presumption against retroactive application because the case fell into the exceptions to the *Bradley* rule. Despite the fact that the case involved only public entities, the Court in *Bennett* held that retroactive application would impinge on pre-existing rights of the parties. 470 U.S. at 639.[12] It also found legislative history indicating that the statute should apply prospectively only. *Id.* at 641.

In two other recent decisions, this Court adhered to the traditional presumption that statutes operate prospectively only

NOTES *(Continued)*

In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982), the Court assumed "*arguendo*" that a new statute applied, but found that, even if it did apply, it would not alter the result. The three dissenting Justices would have explicitly held the new statute applicable retroactively under the *Bradley* standard. *Id.* at 90-91 n.1.

11. The rule that decisions operate retroactively stems from the traditional notion that judges "found" the law rather than made law. *See* Comment, *Prospective Overruling And Retroactive Application In The Federal Courts*, 71 Yale L.J. 907, 907-08 (1962).

12. The Court did not express the test in terms of "vested" or "unvested" rights. *Id.*

without even attempting to reconcile its approach with *Bradley*. *See Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988); *United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982).

In *Security Indust. Bank*, the Court held that a 1978 amendment to the bankruptcy law, which allowed a debtor to avoid non-purchase money liens on household appliances and furnishings, did not apply to creditors who obtained their liens prior to the enactment date of the new law. In an Opinion authored by Chief Justice Rehnquist, the Court rejected the argument that current law should apply, explaining that the " 'first rule of construction is that legislation must be considered as addressed to the future, not to the past.' " 459 U.S. at 79 (quoting *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). The Court further noted that " '[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.' " 459 U.S. at 79-80 (emphasis added) (citing *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908)). Chief Justice Rehnquist cited *Schooner Peggy* as *support* for the prospective-only presumption. *Id.*

In *Bowen*, 109 S. Ct. at 471, pursuant to rulemaking authority, the Secretary of Health and Human Services in 1984 promulgated cost limits on reimbursements for expenses to health care providers by the government. The cost-limit schedule "included technical changes in the methods for calculating" cost limits for prior reimbursement periods. *Id.* at 470. As in this case, the effect of application of the new calculation method was financially harsh, ostensibly permitting the Secretary to recoup over $2 million in reimbursement payments from the plaintiff group of seven hospitals.

The Supreme Court held that the Secretary could not apply the new calculation method to reimbursement periods prior to its effective date, stating without exception and without qualification that "*congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.*" *Id.* at 471 (emphasis added). The

Court emphasized that "[r]etroactivity is not favored in the law." *Id.*[13] Although the holding appears directly to conflict with the statement in *Thorpe* that the presumption in favor of application of current law "applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization," 393 U.S. at 282, neither the majority nor the concurring opinion even *mentioned Thorpe* or *Bradley* as a limitation on the prospective-only statutory presumption if the law changes while the case is on appeal.

Bowen is most significant for its reliance on and reaffirmation of *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), both of which involved changes in law where the case was pending on direct review and both of which applied a presumption *against* retroactive application of legislation. *Greene*, which the *Thorpe* and *Bradley* decisions had relegated to the status of an "exception," appears in *Bowen* as primary support for the *general presumption against retroactivity*. Moreover, the *Magnolia* case, which deals with a change in the method for calculating interest on a tax refund, is on all fours with this case. Kaiser submits that this Court's reaffirmation of *Greene* and *Magnolia* in *Bowen* represents adherence to the traditional and better-reasoned presumption against retroactive legislation. It also requires reversal of the decision of the Court below based on a contrary rule of statutory construction.

D. The *Bradley* Standard Should Be Reexamined As It Is Unworkable And Produces Arbitrary And Unfair Results.

This case presents this Court with the opportunity to resolve the seeming inconsistency among its decisions as to

13. Justice Scalia, in his concurring opinion, likewise explained that "[r]etroactive legislation has always been looked upon with disfavor . . . and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation." Id. at 479 (citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936)).

whether a presumption exists in favor of, or against retroactive construction of statutes. Kaiser urges the Court to adhere to the traditional presumption articulated in *Bowen* against retroactivity and to reevaluate *Bradley*.

The *Bradley* presumption is unworkable and unfair. Its application arbitrarily depends upon the fortuitous circumstance that an appeal lasts beyond the effective date of a new law. It also depends on individual case circumstances showing the presence or absence of "manifest injustice". It thereby produces widely divergent and unfair results, and infuses the law with an element of uncertainty in an area which would be better served by a bright-line rule. *See Osterneck v. Ernst & Whinney*, 109 S. Ct. 987, 992 n.3 (1989); *Budinich v. Becton Dickinson and Co.*, 108 S. Ct. 1717, 1722 (1988).

The following example in the context of § 1961 illustrates the arbitrary and unfair effect of the *Bradley* standard. Under *Bradley*, an appellate court presumes that amended § 1961 applies to cases before it, even when judgment was entered prior to October 1, 1982. Accordingly, even assuming identical dates of judgment and payment, the duration of the postjudgment proceedings and appeals may determine the amount of postjudgment interest owed. For instance, two identical judgments may be entered in federal district court in Pennsylvania on a particular date – say June 1, 1980. If the appeal in one case concludes prior to October 1, 1982, and interest is then calculated, the defendant would pay only six percent simple interest, regardless of whether he actually *paid* the judgment and the interest after October 1, 1982. By contrast, if the appeal in the other case extends beyond October 1, 1982, the defendant in that case would owe an entirely different amount of postjudgment interest based on T-bill rates, even though the identical judgments were entered and paid on the same dates. Surely the presumptions of statutory construction, which are designed to implement the intent of Congress, should not postulate such an irrational intent of Congress and such an unfair result. This Court itself recognized the arbitrary and unfair nature of this approach in *Bennett v. New Jersey*, 470 U.S. 632, 640 (1985), stating that applying "every statutory change that occurs while

review is pending would be unworkable and would unfairly make obligations depend on the fortuitous timing of completion of the review process."

The "manifest injustice" exception to the *Bradley* presumption is not only unworkable and unfair, it is also impractical and administratively burdensome. The standard contemplates a *subjective, case-by-case* determination of how a statute will be construed, taking into consideration the following factors: "(a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law upon those rights." *Bradley*, 416 U.S. at 717. Under this standard, a statute may apply retroactively in one case and may not in another, depending on the specific case facts. Simply the identity of the parties and whether they are "private" may determine the outcome, since the Court in *Schooner Peggy* emphasized that in controversies between private parties "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . ." 5 U.S. at 110. Likewise, the applicability of the manifest injustice exception to *Bradley* may hinge on whether the case is one of "great national concern", whether the rights involved are sufficiently "mature and unconditional", and the nature and extent of any reliance. 416 U.S. 719-21.

The *Bradley* "manifest injustice" standard requires courts to forever revisit the question of the applicability of a newly-enacted statute. It requires people to guess at the applicability of a new law and it turns on close questions of the "nature" of parties, their rights and the relative importance of the issues. *See Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting and endorsing an "objective" rather than subjective "case-by-case application" of a statute).

The decisions of the Courts of Appeals applying *Bradley*'s "manifest injustice" test in the context of § 1961 illustrate precisely how it can and does produce unfair results. In *Litton Systems, Inc. v. A. T. & T.*, 746 F.2d 168 (2d Cir. 1984), the Court applied *Bradley's* "manifest injustice" standard to facts virtually identical to the facts of this case. As here, the parties were private parties. As here, the underlying case was an

antitrust case. And as here, the question of the appropriate amount of postjudgment interest was addressed by the Court of Appeals after the effective date of amended § 1961.[14] The Second Circuit, however, came to a conclusion directly contrary to the decision of the Court below, holding that manifest injustice *would* result from application of amended § 1961 to judgments entered prior to its effective date. Applying *Bradley* has led to disparate results for other statutes as well. *Compare United States v. Zannino*, 761 F.2d 52, 55-57 (1st Cir. 1985) (holding that retroactive application of newly-enacted Bail Reform Act to revoke bail of defendant is not manifestly unjust) *with United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (finding manifest injustice and denying retroactive effect of Bail Reform Act under same facts).

Statutory construction should not be accomplished on the individual, case-by-case basis that *Bradley* requires. Accordingly, Kaiser urges this Court to reconsider *Bradley*.[15] In the absence of clear evidence of congressional intent to the contrary, a statute that is silent on the question of retroactivity should be presumed to apply only prospectively. *See Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988).

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14. In *Litton*, prior to the enactment of amended § 1961, a stipulation entered into by the parties inv ving a stay pending appeal reflected the parties understanding that postjudgment interest was accruing at the state law rate of nine percent. *Id.* at 170. Likewise here, as the district court explained, it was "the common understanding of both parties and this court" that interest was running at six percent. (P.A. 46).

15. The Court in *Bradley* recognized that the *Schooner Peggy* doctrine had never explicitly been extended to cases where legislation was not expressly retroactive. 416 U.S. at 712. Moreover, because the legislative history of the statute at issue in *Bradley* contained evidence that Congress intended the statute to apply retroactively, the Court in *Bradley* need not have reached the issue of the scope of *Schooner Peggy*. Kaiser urges this Court to reconsider the dicta in Bradley which appear to extend *Schooner Peggy*.

III. THE COURT BELOW ERRED IN HOLDING THAT INTEREST BEGAN TO ACCRUE ON THE DATE OF THE DAMAGE VERDICT.

Section 1961 provides that interest "shall be calculated *from the date of the entry of the judgment*. . . ." 28 U.S.C. § 1961.[16] Due to the procedural complexity of this case, the lower courts struggled with the identification of "the date of entry of the judgment." However, despite the existence of *two judgment* dates in this case, both lower courts chose instead to begin the accrual of postjudgment interest on the date of a jury damage *verdict*. Kaiser urges this Court to reverse the decision of the Court of Appeals, as the result reached contravenes the plain terms of § 1961.

The procedural chronology of this case is not disputed as it pertains to this question. After retrial of the damage portion of the case, a jury returned a damage verdict on December 2, 1981. *Two days later,* the district court entered judgment in the trebled amount of $9,567,939. On January 18, 1983, the district court partially granted Kaiser's motion for judgment n.o.v., vacated the December 4, 1981 judgment, and entered judgment in the amount of $4,651,560. The Court of Appeals reversed on December 27, 1984, ordering that the December 4, 1981 judgment be reinstated. This Court denied Kaiser's Petition For A Writ Of Certiorari on June 23, 1986 and the case was remanded to the Court of Appeals, which on July 1, 1986 remanded to the district court. On July 2, 1986, the order of the Court of Appeals reinstating the December 4, 1981 judgment was entered on the district court docket.

16. When Congress amended § 1961 in 1982, it did not alter the language of the statute which identifies the date of "entry of judgment" as the starting date for the accrual of postjudgment interest.

A. The Plain Language Of The Statute Provides That Interest Shall Run From The Date Of "Entry Of The Judgment".

Relying on its prior decision in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), the Court of Appeals below held that postjudgment interest runs from the date of "ascertainment of damages", regardless of whether that date is the *judgment* date or the *verdict* date. In *Poleto,* three months intervened between the jury damage verdict and the entry of judgment and the Court of Appeals reasoned that it would be inequitable to deny the successful plaintiff interest during this period of delay. In this case, however, the Court of Appeals extended the *Poleto* reasoning beyond cases where it finds an inordinate delay between the verdict and the judgment, to a case where judgment was entered promptly, a mere two days after verdict. The approach adopted by the Court below thus appears to *mandate* the running of interest from the date of a damage verdict in all cases, even when there is no unusual delay between the date of the verdict and the date of entry of judgment. No other court of appeals has so held, although at least two other courts of appeals have allowed, under a so-called "equitable construction" of § 1961, postjudgment interest measured from the date of a jury damage verdict when entry of judgment is delayed to some later date. *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).[17]

17. The Fifth and Seventh Circuits have also "equitably construed" § 1961, but only to allow interest to be calculated from a *later* date — the date of entry of judgment upon remand to the district court after the exhaustion of all appeals. *See Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson,* Nos. 86-2474, 86-2475, Slip. op. (7th Cir. Nov. 6, 1987). In one instance in which it was specifically asked to do so, the Fifth Circuit explicitly refused to allow postjudgment interest to be calculated from the date of the verdict. *See Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157, 1168 (5th Cir. 1972). The Court of Appeals for the District of Columbia Circuit rejects the "equitable construction" approach altogether and adheres to the language of § 1961. That court requires "entry of judgment" to begin the accrual of

This Court should correct the erroneous holding of the Court below and the other courts which, under the guise of "equitable construction", have rewritten the plain language of § 1961. Congress could not have been more specific in drafting § 1961. The statute provides that "interest shall be calculated *from the date of the entry of the judgment* . . ." (emphasis added). The distinction between *a verdict* and *a judgment* is clear and is set forth in Fed. R. Civ. P. 58. *See also United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958) (defining "entry of judgment"). Had Congress intended postjudgment interest to run from the date of verdict, it could simply have drafted or amended the statute to so provide. It did not do so.

This Court has consistently held that, in the "absence of a 'clearly express legislative intention to the contrary', the language of the statute itself 'must ordinarily be regarded as conclusive.' " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597 (1986)). "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also United States v. Monsanto*, 57 U.S.L.W. 4826, 4827 (June 22, 1989) ("In determining the scope of a statute, we look first to its language") (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

The language of § 1961 is not ambiguous and there is no indication that Congress intended the term "entry of judgment" to be construed other than in conformity to its plain meaning as defined in Fed. R. Civ. P. 58. Moreover, there are no "exceptional circumstances" in this case. The jury returned answers to

NOTES *(Continued)*

postjudgment interest. *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614, 616-18 (D.C. Cir. 1980). In *Hooks*, the court specifically rejected the plaintiff's argument that interest should be calculated as of the date of the jury damage verdict. *Id. See also Millers' Nat. Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93, 104 (10th Cir. 1958) (refusing to measure postjudgment interest from date of verdict).

interrogatories on December 2, 1981, requiring the district court to "promptly approve the form of the judgment" and the clerk thereafter to enter it. "Entry of judgment" occurred promptly on December 4, 1981, and the explicit terms of § 1961 preclude measuring postjudgment interest from any date prior to December 4, 1981.

The date chosen by the Court below to begin the accrual of interest was not "the date of entry of the judgment" and the Court's holding should be reversed.

B. Rule 37 Does Not Expand The Authority To Award Postjudgment Interest In A Way Inconsistent With The Terms Of § 1961.

Fed. R. App. P. 37 provides that "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to the allowance of interest." Respondents have suggested that this rule allows the Court of Appeals discretion to depart from the express terms of § 1961 and measure postjudgment interest from the date of the verdict or any other date which it finds "equitable".[18] This argument has no merit.

This Court has consistently explained that, pursuant to 28 U.S.C. § 2071, the rules promulgated by all federal courts "must also be consistent with Acts of Congress." *Frazier v. Heebe*, 482 U.S. 641, 646 n.4 (1987). *See Colgrove v. Battin*, 413 U.S. 149, 161 n.18 (1973) (if a rule "would conflict with an Act of Congress" it "would therefore be invalid").

To be a valid rule, therefore, Rule 37 must be read in harmony with 28 U.S.C. § 1961 and must encompass its requirement that interest run from "the date of entry of the judgment." If the second sentence of Rule 37 provides any

18. In their Cross-Petition, respondents further argue that Rule 37 allows the Court of Appeals discretion to award postjudgment interest at a rate higher than that specified in § 1961. This argument fails for the same reason, and Kaiser will address it at length in their Responsive Brief.

discretion with respect to the date from which to measure post-judgment interest, that discretion only comes into play when more than one valid money *judgment* has been entered in a case. Then, the Court of Appeals, pursuant to Rule 37, may exercise its discretion to choose the appropriate *judgment* from which to measure interest.

C. The Equities In This Case Favor Interest Calculated From The Date The Judgment Was Reinstated.

The only possible judgment dates from which to begin the accrual of postjudgment interest in this case under § 1961 are December 4, 1981 (the date the reinstated judgment was originally entered) or July 2, 1986 (the date the judgment was reinstated on the district court docket). Kaiser submits that the Court of Appeals erred when it refused to measure interest from July 2, 1986. The equities in this case favor a calculation of postjudgment interest starting on July 2, 1986, the date the judgment was reinstated after remand from this Court and from the Court of Appeals.

On similar facts, this result was reached in *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 711-12 (5th Cir. 1986) (*in banc*). In that case, as here, the "summary of this long, drawn-out antitrust action amply demonstrates that [respondents'] victory was far from clear-cut . . ." *Id.* at 711. In concluding that the equities of the case justified interest measured from the date of remand after the exhaustion of all appeals, the Court reasoned that:

> We would emphasize that our construction of the equities in this case does not force [respondent] to go uncompensated for the loss of value on its money judgment. [Respondent] is entitled, as are all successful antitrust plaintiffs, to recover treble damages from [petitioner]. "Although the treble damage provision may be partially justifiable on compensatory grounds, its principal purpose is to deter antitrust violations. The prospect of a damage award multiplied threefold should provide an incentive for private parties to instigate costly litigation, thus supplementing

> Governmental enforcement." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128, 43 L.Ed.2d 400 (1975) (footnotes omitted). In short, [respondent] will collect 6.3 million dollars in damages plus interest from the date final judgment was entered. Because the 4.2 million dollars in treble damages exceeds [respondent's] actual losses, we are not in this case presented with the usual, uncompensated "wronged plaintiff" for which the equitable construction and application of § 1961 and Rule 37 was intended.

Id. at 712.

The *Affiliated Capital* reasoning is equally applicable here. Respondents' victory was far from "clear cut." It took three trials to secure the favorable result in this case. Of five claims contained in the Complaint, respondents failed to prevail on all but one. Respondents also failed to prove a conspiracy claim against two other named defendants, Robert A. Kennedy and Kennedy Culvert Supply Company. After the Court of Appeals reversed the initial directed verdict in Kaiser's favor, respondents failed adequately to prove the existence of damages, necessitating the vacation of the judgment and the retrial of the damage portion of the case. Moreover, when this Court requested the views of the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division on the issues raised in Kaiser's Petition For A Writ Of Certiorari on the merits of the antitrust claims, they characterized the decision of the Court of Appeals as erroneous. *See* Brief For The United States As Amicus Curiae, No. 84-1907 (May 1986). Indeed, they stated that the decision had such "obvious shortcomings" that it was doubtful that any other court would follow the reasoning which led to respondents' victory. *Id.* at 17. Finally, respondents' $9.6 million treble damage recovery exceeded by $6.4 million the damages found by the jury. Like the plaintiffs in

Affiliated Capital, respondents here are not the "usual, uncompensated 'wronged plaintiff' for whom the equitable construction and application of § 1961 and Rule 37 was designed."[19]

If § 1961 has a deterrent purpose to discourage frivolous appeals, it is inapplicable here and should not prevent this Court from measuring interest from July 2, 1986.[20] The district court specifically found that Kaiser's appeals and Petitions to this Court were "not frivolous and not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending." (P.A.47). *See also Brown & Williamson Tobacco Corp. v. Jacobson,* Nos. 86-2474, 862475, Slip. op. (7th Cir. November 6, 1987) (choosing under equitable principles to measure interest from the date of remand from the Court of Appeals).

To the extent that Fed. R. App. P. 37 affords discretion in choosing on which of several judgment dates to begin the accrual of postjudgment interest in this case, the equities favor July 2, 1986, the date of entry of the judgment upon remand from the Court of Appeals.

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19. Indeed, respondents' $9.6 million recovery is shockingly generous in light of the fact that Columbia's financial statement for its *best year,* prior to the illegal conduct it alleges Kaiser engaged in, showed a net profit of only $21,322. (Appendix to Kaiser's Brief in Appeal No. 83-1079, at 4898).

20. The appeal following the December 4, 1981 judgment was actually initiated by respondents. Kaiser cross-appealed the liability issues.

CONCLUSION

For all of the foregoing reasons, Kaiser respectfully requests that the Judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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